

14 June 2018

Christina McKelvie
Convener
Equalities and Human Rights Committee
Room T2.60I The Scottish Parliament
Edinburgh. EH99 1SP

Our ref: RA

Via email to: Equalities.humanrights@parliament.scot

Dear Ms McKelvie

Your letter of 23 May 2018

Thank you for your letter asking about the approach the SPSO takes to Human Rights. In particular you referred to the approach taken by the Northern Ireland Public Services Ombudsman (NIPSO), Marie Anderson.

I, and my office, are deeply committed to equality and rights, including Human Rights. Your request coincides with activities we are engaged in (or have planned) specifically in relation to human rights. Many of these are in the early stages. As you may imagine, this is in relation to both how we carry out our own functions, and in how we assess the actions of Scottish public authorities.

SPSO approach

The way in which we deliver our own service is rooted in rights, including human rights. This is reflected in our vision, values and equality commitments:

SPSO vision

The Scottish Public Services Ombudsman contributes actively and positively to Scotland's development and delivery of first class public services: putting people and learning at the heart of what we do by being innovative and world-leading in our approach to complaints, reviews and standards.

SPSO values

- We work **independently** and **fairly**
- We are **people-focused** and **value integrity and respect**
- We **value learning and improvement**

Equalities commitments

1. Take proactive steps to identify and reduce potential barriers to ensure that our service is accessible to all.
2. Identify common equality issues (explicit and implicit) within complaints or reviews brought to our office and feedback learning from such cases to all stakeholders.
3. Ensure that we inform people who make a complaint or request a review of their rights and of any available support, and that we encourage public authorities to do the same.
4. Ensure that we play our part in ensuring that service providers understand their duties to promote equality within their complaints handling and review procedures.
5. Monitor the diversity of our workforce and supply chain, and take positive steps where under-representation exists.

Rights and our complaints casework

As an Ombudsman scheme, much of our work involves consideration of complaints where people feel they have not been treated with dignity or respect. We can reflect on a failure to respect someone's rights in our casework. For example, we reported publicly that we considered the number of individual failings a patient with dementia had experienced meant there had been an overall failure to consider the rights of that patient.¹

While much of our casework could be reframed in the language of human rights, and we say more about that below, currently, it is in the area of discrimination that we are most likely to explicitly refer to individual rights. Recent examples include:

- Reporting on a failure by one GP practice to ensure parity between physical and mental health²
- Upholding a complaint about failures to take account of the Equality Act 2010 in a case relating to school trips³ and
- Concerns that a consultation booking procedure used in one NHS hospital would not meet the needs of people with disabilities⁴.

In all of those cases, like much of our work, recommendations seek not only to resolve the issue for the person bringing the complaint but to improve the service for the future.

While I am confident that as an organisation, a human rights approach is embedded in the way we work, it is fair to say that reference to human rights is not explicit. We do not for example, operate a

¹ <https://www.spsso.org.uk/investigation-reports/2015/may/borders-nhs-board>

² <https://www.spsso.org.uk/decision-reports/2018/may/decision-report-201700486-201700486>

³ <https://www.spsso.org.uk/decision-reports/2017/december/decision-report-201606223-201606223>

⁴ <https://www.spsso.org.uk/decision-reports/2016/june/decision-report-201401536-201401536>

Human Rights Framework in the way that the NIPSO does. While we might make reference to human rights if raised in a specific complaint, we do not assess against them in quite the same way. This, in part, reflects that, one of the ways we keep the person at the heart of our work is by ensuring, as far as possible, our decisions reflect their language and concerns and it is rare that someone bringing us a complaint will mention rights explicitly, or use human rights language.

Even before you wrote to me, I had been considering how a similar approach to NIPSO might work in Scotland, bearing in mind we have a different human rights structure to Northern Ireland and the rest of the UK. I am familiar with the NIPSO's Human Rights Manual) am visiting Ms Anderson's office to find out more about how it works in practice this week. Ms Anderson is also visiting our office at the end of June.

I am also in contact with the Scottish Human Rights Commission about working jointly with them to explore adapting or creating something similar for a Scottish context. Any work we do is likely to be in the next financial year as both our organisations are fully committed in terms of both resources and capacity this year.

The wider context

It might be helpful if I summarise the SPSO's functions. I have three distinct areas of statutory functions/powers:

1. The final stage for complaints about most devolved public services in Scotland including Councils, the Health Service, Prisons, Water and Sewerage Providers, Scottish Government, Universities and Colleges.
2. Specific powers and responsibilities to publish complaints handling procedures and support best practice in complaints handling.
3. Independent Review Service for the Scottish Welfare Fund with the power to overturn and substitute decisions made by councils on community care and crisis grant applications.

Additionally, I will be taking on the role of Independent National Whistleblowing Officer for the NHS in Scotland. This will include setting whistleblowing complaints standards and principles, and being the independent reviewer for how individual whistleblowing complaints are handled by NHS organisations.

In this context we are supportive of the developments in Scotland to embed human rights concepts and practice within legislation, guidance and service standards . For example:

- when given the new role as Independent Reviewer for the Scottish Welfare Fund in 2016 we asked for specific changes to the legislation to ensure we could meet ECHR standards. When preparing for the new function, we undertook a joint Equalities and Human Rights Impact analysis of our proposed approach
- the legislation that underpins the welfare fund is explicitly founded on rights-based approach and in our assessment of decisions we can use that to help us determine the way the guidance should be interpreted.

The SPSO Act gives me the powers (and duty) to lay reports before Parliament. Casework reports are laid in a monthly compendium. These reports include findings, and recommendations we made both to seek redress for personal injustice and to drive improvement in services to prevent problems recurring.

These examples of real lived experience often raise issues such as dignity and respect or access to services which could reflect on the way rights are or are not being respected in service delivery. We know organisations look at the complaints we have upheld against others to help them improve their services before they receive similar complaints and that our cases can be used by others to effect and support change. For example, in 2016, the EHRC followed up one of our reports with a direct contact to an NHS Board to ensure equalities commitments were being met⁵

I also lay an Annual Report and occasional “thematic reports”. The two most recent thematic reports both took a rights based approach.

1. **Informed consent**⁶. This report has an explicit focus on the rights of individuals receiving health care. The includes a practical self-assessment tool for organisations to use to help them ensure people’s rights are being respected when seeking and obtaining medical consent.
2. **Making complaints work for everyone**⁷. This report focused on the impact of being complained about on staff and organisations. The way staff (and complainers) are supported and treated is central to the report which draws on equalities and rights legislation and approaches.

Common to both reports was consultation with other organisations and reference to wider rights. For example the Informed Consent report makes explicit reference to the ECHR and how seeking consent should be ECHR compliant.

Another area where we are part of a wider human rights conversation is through our membership of professional bodies such as the Ombudsman Association (OA) and the International Ombudsman Institute (IOI). For example, the OA is working with the EHRC on a human rights framework for UK Ombudsmen (on which we may be able to draw for the Scottish context). The IOI runs workshops and events which consider rights in various contexts and earlier this year I attended a workshop on Human Rights in a Digital Age, where the issue of rights and digital services in an ombudsman context were explored.

The SPSO is a regular contributor to consultations on a range of matters, including legislative development. For example, we recently gave evidence on the Social Security (Scotland) Act 2018, which very clearly seeks to embed human rights.

The SPSO Act was passed in 2002. To put this in context it was at a time when email was not widely used by individuals, before smart phones, when digital services as we know them did not exist, and when rights-based approaches were in their infancy. Since taking up office, I have been considering whether the SPSO Act remains fit for purpose in what is a very different public service landscape. There are two areas, that have a particular relevance for equalities and rights where I consider my legislation needs updating or amending.

1. The ability to take complaints in any format. My Act states complaints must be in writing. It gives me the discretion to accept them in other formats if there are special circumstances, but

⁵ <https://www.equalityhumanrights.com/en/our-work/news/ehrc-seeks-assurance-nhs-scotland-over-equal-access-health-care>

⁶ <https://www.spsso.org.uk/news-and-media/informed-consent-report>

⁷ <https://www.spsso.org.uk/news-and-media/making-complaints-work-everyone-report>

the onus is on the complainer to highlight those circumstances. I don't have the discretion to proactively decide to accept complaints in other formats. I see it as essential to delivering an accessible Ombudsman scheme, that I can. For example, if a homeless person made the case that they had no means to make a complaint in writing (which includes e-mail) I could decide to accept the complaint over the phone. What I cannot do, is decide that homeless people as a vulnerable group have the automatic option to submit complaints in this way. This does not support a rights-based approach.

2. Under the Scottish scheme my office has no power to undertake own initiative investigations. Such powers allow an Ombudsman to investigate issues even if a complaint has not been made about those issues. These are often cross-cutting, relating to particular demographic groups or have significant impact on how individuals access complaints and public services. There is a strong value and public interest in investigating them. We are in discussion about amendments to my legislation to include these powers.

In this respect Scotland is lagging behind in its ability to develop and deliver a modern Ombudsman service: most European Ombudsman and NIPSO (and very soon the Welsh Public Services Ombudsman) already have these powers and have used them to good effect to highlight systemic issues.

The Local Government and Communities Committee has already expressed an interest in these proposals⁸ and I would be happy to provide further detail if it would be of interest to the Committee.

While, not following directly the same approach as the NIPSO, I hope this gives you a flavour of this dynamic area of the SPSO's work and assurance that human rights are a feature of what we do. I would be very happy to speak with you about any of the points raised.

Yours sincerely

A handwritten signature in black ink that reads "Rosemary Agnew". The signature is written in a cursive, flowing style.

Rosemary Agnew
Scottish Public Services Ombudsman

⁸ http://www.parliament.scot/S5_Local_Gov/General%20Documents/20180207_ConvenerToSPSO.pdf